UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **DEFENDANTS' RESPONSE TO STATE OF OKLAHOMA'S "BENCH BRIEF REGARDING ADMISSIONS BY PARTY-OPPONENTS UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)" (DKT. NO. 2714)**

On October 20, 2009, the State filed a bench brief with the stated aim of assisting the Court in evaluating whether evidence offered by the State qualifies as a nonhearsay statement by a party-opponent under Federal Rule of Evidence 801(d)(2). (Dkt. No. 2714.) Because that brief largely ignores controlling Tenth Circuit precedent and instead offers the Court authority from other jurisdictions that differs from the distinct Tenth Circuit rules for admissibility, Defendants offer this Response.

DISCUSSION

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." United States v. Pulido-Jacobo, 377 F.3d 1124, 1132 (10th Cir. 2004) (citation omitted). The Tenth Circuit instructs that "hearsay evidence that does not meet an exclusion or exception is generally inadmissible at trial." Pulido-Jacobo, 377 F.3d at 1132 (citing Fed R. Evid. 802). "For hearsay within hearsay to be admitted as evidence, a hearsay exception must apply to each link of the chain." Regan-Touhy v. Walgreen Co., 526 F.3d 641, 651 (10th Cir. 2008) (relying on Rule 805 to exclude testimony where not all levels of hearsay were subject to an exclusion or exception); accord Fed. R. Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the

combined statements conforms with an exception to the hearsay rule provided in these rules.")[1]

Rule 801(d)(2) excludes from the definition of hearsay five distinct types of out-of-court statements offered for the truth of the matter asserted. This Response addresses three of those categories: Category B (adoptive admissions), Category C (statements by an authorized speaker), and Category D (statements by a party agent or employee). Nonhearsay statements allowed in evidence pursuant to "Rule 801(d)(2) may, but are not required to be, against interest." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 665 n.11 (10th Cir. 2006) (quoting Weinstein's Fed. Evid. § 801.30[1] at 801-48 (2d ed. 2005)).

The offering party carries the burden of proving that evidence qualifies as nonhearsay. E.g., Green v. Haskell County Bd. of Comm'rs, 568 F.3d 784, 804 fn.12 (10th Cir. 2009); Simpson v. Saks Fifth Ave, Inc., 07-CV-0157-CVE-PJC, 2008 U.S. Dist. LEXIS 60480, at *12-13 (N.D. Okla. Aug. 8, 2008). Moreover, even if a statement is nonhearsay under Rule 802(d)(2), the statement must still be analyzed as for admissibility under the remaining Federal Rules of Evidence. See United States v. Oberle, 136 F.3d 1414, 1418 (10th Cir. 1998); United States v. Allums, 2009 U.S. Dist. LEXIS 31826, at *4 (D. Utah Apr. 14, 2009).

The hearsay rules are formulated to provide the fact-finder with reliable evidence, as opposed to the myriad out-of-court statements that cannot be verified. For example, as discussed below, a party may have recognized an out-of-court statement as true and acted accordingly. But, in contrast, a party may also have encountered a variety of out-of-court statements and

[1] Although the issue is outside the direct scope of this Response, the Court's consideration of the hearsay analysis here should take into account the State's disagreement with this fundamental Rule 805 requirement, which the Tenth Circuit stated most recently in the 2008 case of Regan-Touhy. The State contends instead that each layer of hearsay need *not* be qualified for a document's admission under the hearsay exception in Rule 803(8)(C) for government investigation records. (See, e.g., Dkt. No. 2724 at 3-6: State's Opp'n to Defs.' Mot. Strike Portions of Ex. 3351) (relying on the absence of analysis in Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986), and on non-Tenth Circuit cases).)

assertions that the party merely stores in its files or forwards to others for review without any analysis of the truth or falsity of those out-of-court statements. The State's bench brief does not discuss these critical distinctions.

A. Tenth Circuit Law on Rule 801(d)(2)(B) Adoptive Admissions.

To establish that a statement offered for its truth qualifies as a nonhearsay "adoptive admission" under Rule 801(d)(2)(B), the State must prove that the Defendant against whom the statement is offered "manifested an adoption or belief" in the truth of that statement. E.g., Green, 568 F.3d at 804 n.12. "The adoptive admission exception applies at the time the original statement is made," not belatedly after the fact. Wells v. Boston Ave. Realty, 125 F.3d 1335, 1341 (10th Cir. 1997).

The State's bench brief does not fully explain that in the Tenth Circuit, an adoptive admission requires action (or meaningful inaction) on the part of the party-opponent. Wright-Simmons v. Okla. City, 155 F.3d 1264, 1268 (10th Cir. 1998); compare Dkt. No. 2714 at 2-5. For example, mere possession of a document does not suffice. United States v. Tunkara, 2005 U.S. Dist. LEXIS 19175, at *3 (D. Kan. Aug. 9, 2005). Rather, to evaluate whether a party has manifested a belief in the truth of a document, this Court must determine "whether the surrounding circumstances tie the possessor and the document together in some meaningful way." Wright-Simmons, 155 F.3d at 1268 (adopting Pilgrim v. Trustees of Tufts College, 118 F.3d 864, 870 (1st Cir. 1997)). "A document is sufficiently tied to the possessor **to the extent the adoptive party accepted and acted upon the evidence**." Id. (emphasis added, internal quotations omitted). The Tenth Circuit has referred to this analysis as the "possession plus

standard." Pulido-Jacobo, 377 F.3d at 1132 (citations omitted).[2] In Pulido-Jacobo, the Tenth Circuit upheld the admission of a key receipt under Rule 801(d)(2)(B) upon finding that the defendant had for several months kept the receipt near a product matching that receipt. Id.

The Pilgrim case that the Tenth Circuit adopted in Wright-Simmons provides a telling example of the level of action that is required to demonstrate that a party has adopted a statement as its own, rather than simply possessing the statement of another without making any determination as to its truth or falsity. In Pilgrim, a committee formed by the defendant college investigated harassment allegations lodged by the plaintiff and submitted a report to the college president, who then implemented all of the report's recommendations and demoted the alleged harasser. Wright-Simmons, 155 F.3d at 1268 (citing Pilgrim, 118 F.3d at 870). The First Circuit determined that the president would not have demoted the employee unless he accepted the report's conclusions as truth. Id. "As such, his acceptance of the contents of the Report and his implementation of its recommendations, without disclaimer, served as an adoption of the Report for the purposes of Rule 801(d)(2)(B)." Id. (quoting Pilgrim, 118 F.3d at 870). The Wright-Simmons court applied this analysis to similarly find that a report and attached notes that formed the basis for firings were adopted by the defendant city employer and thus were not hearsay. Id. at 1268-69 ("Because [the City Manager] accepted the documents and acted upon them, we hold that neither the two-page report nor the attached notes are hearsay, and are therefore admissible.")

Like most hearsay exceptions and exclusions, the Tenth Circuit has applied this rule narrowly and carefully. For instance, in United States v. Harrison, the court addressed in detail

[2] Although the cases the State cites for Category B adoptive admissions seem to follow the "possession plus standard" (see Dkt. No. 2714 at 2-5), the State's bench brief makes no mention of the standard itself.

the evidentiary support for the 801(d)(2)(B) admission of incriminating statements by the defendant made during an agent's questioning of a child victim that indicated the defendant adopted the child's version of events, ultimately upholding admission of the statements. 296 F.3d 994, 1001-02 (10th Cir. 2002); see also, e.g., Wagstaff v. Protective Apparel Corp. of Am., 760 F.2d 1074, 1078 (10th Cir. 1985) (the defendants "unequivocally manifested their adoption" of inflated statements in newspaper articles by reprinting and distributing the articles to certain business contacts); Grundberg v. Upjohn Co., 137 F.R.D. 365, 370 (D. Utah 1991) (finding that a pharmaceutical manufacturer manifested its belief in the truth of protocol study reports by submitting the reports to the FDA in an effort to gain approval of a new drug). Similarly, the circuit court conducted a careful analysis before holding that the mere presence of a party's name on a bill does not suffice to show that the party manifested a belief in the truth of the bill's contents. United States v. Jefferson, 925 F.2d 1242, 1253 n.13 (10th Cir. 1991) (refusing to admit a pager statement as an adoptive admission);

With respect to inaction, a party may adopt a statement by silence only where the statement is one that would naturally require a response. E.g., Fed. R. Evid. 801(d)(2)(B) advisory committee note (1972) ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior.") In the Tenth Circuit, the offering party must also demonstrate that the opposing party both understood the statement and was able to reply to it but did not. Green, 568 F.3d at 804 fn.12 (citing 5 Weinstein's Fed. Evid. (2d ed. 2009), and New Eng. Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 650 (10th Cir. 1989)); see also United States v. Wolf, 839 F.2d 1387, 1395 n.5 (10th Cir. 1988) ("Where a person hears, understands and has the opportunity to deny an accusatory

statement made in his presence, the statement and his failure to deny it are admissible against him as an adoptive admission."). Applying this standard, the Tenth Circuit declined to find that a party adopted a published statement by silence where the offering plaintiff did not establish that the defendant had read the article at issue or that "she was in any position to respond to the article." New Eng. Mut. Life, 888 F.2d at 650.

B. Tenth Circuit Law on Rule 801(d)(2)(C) Statements by an Authorized Speaker

The State's bench brief does not describe the entire Category C test for admission of statements by an authorized speaker. (See Dkt. No. 2714 at 5.) Here, the State may offer evidence as nonhearsay statements by an authorized speaker only if it demonstrates that the Defendant against whom the statement is offered "specifically authorized" the speaker to make statements concerning that particular subject matter. Regan-Touhy, 526 F.3d at 651 n.7 (statements could qualify under Rule 801(d)(2)(C) "only if … Walgreens had specifically authorized [the speaker] to make statements concerning [another employee's] health condition"); see also Fischer v. Forestwood Co., 525 F.3d 972, 984 (10th Cir. 2008) (taped conversations constituted admissions of a party-opponent where the speaker was the company president at the time of speaking and was authorized by the company to make statements about the particular subject matter of hiring and firing). [3]

C. Tenth Circuit Law on Rule 801(d)(2)(D) Statements by a Party Agent or Employee

The State's claim that "case law supports a broad reading" of Category D statements by

[3] On this point, the State's bench brief (Dkt. No. 2714 at 5) fails to mention that the State's principal case holds that "[t]he relevant inquiry in Fed. R. Evid. 801(d)(2)(C) situations is whether the person making the statements had the authority to speak on a particular subject on behalf of the party the admission is to be used against. …. [I]n a Fed. R. Evid. 801(d)(2)(C) inquiry, **the individual must have had specific permission to speak on a subject** …." Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 262 F. Supp. 2d 251, 260 (S.D.N.Y. 2003) (emphasis added).

an agent or employee is not supported by Tenth Circuit law. (See State's Bench Br. at 6: Dkt. No. 2714.) Rather, the Tenth Circuit employs a more rigorous analysis than the courts on whose cases the State relies. Compare, e.g., Seashock v. Harris Corp., 1989 U.S. Dist. LEXIS 3725, at *4 (E.D. Pa. Apr. 11, 1989) (case relied upon by the State at Dkt. No. 2714 at 6, in which the trial court admitted a hearsay document on the "simple ground that it was written by a manager of the defendant"). In this respect, the State's bench brief is not well taken.

This Court has noted that "[t]he Tenth Circuit has identified three factors that must be satisfied before an employee's statement is admissible against an employer under Rule 801(d)(2)." Simpson, 2008 U.S. Dist. LEXIS 60480, at *12 (quoting Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir. 1989)). First, the offering party "must establish the existence of the employment relationship independent of the declarant's statement offered as evidence." Id. (quoting Boren, 887 F.2d at 1038). Second, the offering party must establish that statement was "made during the existence of the declarant's 'agency or employment.'" Id. (quoting Boren, 887 F.2d at 1038 and Fed. R. Evid. 801(d)(2)(D)); see also Robinson v. Audi Nsu Auto Union Aktiengesellschaft, 739 F.2d 1481, 1487 (10th Cir. 1984) (finding that statements by Audi's agent were not admissible against Audi because the agency relationship arose after the statements were made). And third, the offering party must establish that the statement "concern[s] a matter within the scope of declarant's employment." Simpson, 2008 U.S. Dist. LEXIS 60480, at *12 (quoting Boren, 887 F.2d at 1038). This same analysis applies to the agent-principal relationship. E.g., Robinson, 739 F.2d at 1487.

The Tenth Circuit has engaged in detailed analyses to determine whether a statement was made within the scope of agency or employment for 801(d)(2) purposes. For instance, in Grace United Methodist Church v. City of Cheyenne, the court considered deposition testimony and

other evidence revealing the scope of a bishop's authority in order to determine whether letters from the bishop were hearsay. 451 F.3d at 665-67. Upon finding that the bishop's duties included, among other things, assigning, removing, and supervising pastors and supervising and directing funds to parishes, the Tenth Circuit upheld the trial court's finding that the bishop was authorized to speak for the plaintiff parish about a proposed business project. Id. at 665-66. Similarly, in analyzing statements by a non-managerial employee, the court recently noted that statements made by a party employee while she was employed could qualify as Rule 801(d)(2)(D) nonhearsay "only if … making statements concerning [that other employee's] health condition was otherwise a matter within the scope of [the speaker's] employment." Regan-Touhy, 526 F.3d at 651 n.7. Finally, the court has held that testimony by an employee about a coworker's sexual orientation simply could not qualify as Rule 801(d)(2) non-hearsay because such statements could not concern a matter within the scope of the speaker's employment. Dick v. Phone Directories Co., 397 F.3d 1256, 1266 (10th Cir. 2005).

CONCLUSION

In sum, Defendants submit that the Court should disregard the State's proffered analyses and case law in Docket No. 2714 that differ from the controlling Tenth Circuit precedents regarding Federal Rule of Evidence 801(d)(2), as outlined in this Response.

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Respectfully submitted,

BY: /s/ John H. Tucker
John H. Tucker, OBA #9110
Colin H. Tucker, OBA #16325
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100

Tulsa, Oklahoma 74121-1100
(918) 582-1173
(918) 592-3390 Facsimile
-and-
Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000
(612) 766-1600 Facsimile
Attorneys for Cargill, Inc. and Cargill Turkey Production LLC

BY: /s/ Michael Bond
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Michael Bond, AR Bar No. 2003114
Erin Walker Thompson, AR Bar No. 2005250
Dustin Darst, AR Bar No. 2008141
KUTAK ROCK LLP
234 East Millsap Road Suite 400
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007
-and-
Stephen L. Jantzen, OBA No. 16247
Patrick M. Ryan, OBA No. 7864
Paula M. Buchwald, OBA No. 20464
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
-and-
Thomas C. Green
Mark D. Hopson
Timothy K. Webster
Jay T. Jorgensen
Gordon D. Todd
Cara R. Viglucci Lopez
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202)736-8711

-and-
Erik J. Ives
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL, 60603
Telephone: (312) 853-7067
Facsimile: (312) 853-7036
Attorneys for Tyson Foods, Inc,.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; and Cobb-Vantress, Inc.

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
A. Scott McDaniel, OBA 16460
Nicole Longwell, OBA 18771
Philip D. Hixon, OBA 19121
MCDANIEL, HIXON, LONGGWELL & ACORD, PLLC
320 S. Boston Avenue, Suite 700
Tulsa, OK 74103
-and-
Sherry P. Bartley, AR BAR #79009
MITCHELL WILLIAMS, SELIG, GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Attorneys for Peterson Farms, Inc.

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Randall E. Rose, OBA #7753
George W. Owens, ESQ.
OWENS LAW FIRM, P.C.
234 W. 13 Street
Tulsa, OK 74119
-and-
James Martin Graves, ESQ.
Gary V. Weeks, ESQ.
Woody Bassett, ESQ.
Vincent O. Chadick, ESQ.
K.C. Dupps Tucker, ESQ.
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Attorneys for George's, Inc., and George's Farms, Inc.

BY: /s/John R. Elrod
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
JOHN R. ELROD
VICKI BRONSON, OBA #20574
BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
100 W. Central Street, Suite 200
Fayetteville, AR 72701
Attorneys for Simmons Foods, Inc.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Robert P. Redemann, OBA #7454
Williams D. Perrine, OBA #11955
Lawrence W. Zeringue, ESQ.
David C. Senger, OBA #18830
Gregory A. Mueggenborg, OBA #7454
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
-and-
Robert E. Sanders
Stephen Williams
YOUNG, WILLIAMS, HENDERSON & FUSILIER
Post Office Box 23059
Jackson, MS 39225-3059
Attorneys for Cal-Maine Foods, Inc.

CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	Daniel.lennington@oag.ok.gov

Melvin David Riggs driggs@riggsabney.com
Joseph P. Lennart jlennart@riggsabney.com
Richard T. Garren rgarren@riggsabney.com
Sharon K. Weaver sweaver@riggsabney.com
Robert Allen Nance rnance@riggsabney.com
Dorothy Sharon Gentry sgentry@riggsabney.com
David P. Page dpage@riggsabney.com
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS, P.C.

Louis W. Bullock lbullock@mkblaw.net
J. Randall Miller rmiller@mkblaw.net
MILLER KEFFER & BULLOCK PEDIGO, LLC

William H. Narwold bnarwold@motleyrice.com
Frederick C. Baker fbaker@motleyrice.com

Lee M. Heath lheath@motleyrice.com
Elizabeth Claire Xidis cxidis@motleyrice.com
Fidelma L Fitzpatrick ffitzpatrick@motleyrice.com
Mathew P. Jasinski mjasinski@motleyrice.com
MOTLEY RICE, LLC
COUNSEL FOR PLAINTIFFS

A. Diane Hammons diane-hammons@cherokee.org
Attorney General, Cherokee Nation
Sara E. Hill sara-hill@cherokee.org
COUNSEL FOR INTERVENER, CHEROKEE NATION

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Jennifer S. Griffin jgriffin@lathropgage.com
LATHROP & GAGE, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

Philard L. Rounds, Jr. PhilardRounds@holdenoklahoma.com
HOLDEN & CARR HM@HOLDENOKLAHOMA.COM
COUNSEL FOR SNAKE CREEK MARINA

/s/ John H. Tucker

fb.us.4514775.07